

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 3, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP1106

Cir. Ct. No. 2016CV830

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

FRANK GODEC,

PLAINTIFF-APPELLANT,

V.

**HIDDEN LAKES COMMUNITY ASS'N, LTD., DAN LAU, LINDSEY LAU
AND JANET MCKNIGHT,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County:
KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Frank Godec challenges a \$75 annual assessment levied by the subdivision association of which he is a member. On dueling motions for summary judgment, the circuit court found the assessment valid. We affirm.

FACTS

¶2 Hidden Lakes is a 127 lot subdivision located in Waukesha County that came into existence in 1968. In addition to the residential lots, the subdivision also has “common” property consisting of two lakes, beaches, parks, golf courses, and playgrounds. In order to maintain the “common” property, the Hidden Lakes Community Association, LTD (Association) was incorporated under Chapter 181 of the Wisconsin Statutes as a nonstock, nonprofit corporation. Each lot owner within Hidden Lakes is a member of the corporation. The affairs of the Association pursuant to the Articles of Incorporation are to be managed by a Board of Directors, and, prior to the controversy that lead to this lawsuit, the Board had the right “to assess all members on an *equal* basis for the maintenance, management, or other improvement of community lands.” (Emphasis added.)

¶3 Thirty of the 127 lots are “on-lake” lots within Hidden Lakes. Prior to 2015, all lots were assessed in an “equal” amount to pay for maintenance of all common property within the subdivision. For example, in 2013 and 2014 respectively, each member (i.e., each lot) was assessed \$230. The \$230 included funds for maintenance of the lakes. In 2015, disputes arose that “on-lake” lot owners should pay more in assessments than “off-lake” lot owners. At the annual meeting in 2015, the members were presented with a proposal that lake maintenance would be an assessment apart from the assessment for all other common property and that the assessment for lake maintenance would provide that

“on-lake” members would pay a lake assessment three times the amount that “off-lake” members would pay and set the 2015 lake assessment for “on-lake” members at \$225 and \$75 for “off-lake” owners. Seventy-four members voted in favor and twenty-one members voted against. Godec is an “off-lake” owner unhappy with the assessment agreed upon by more than a majority of all lot owners within Hidden Lakes.

ANALYSIS

¶4 Godec does not believe the \$75 assessment, nor how it was arrived at, was fair and sued the Association as well as individuals who served on the Board of Directors of the Association (the defendants). Godec and the defendants filed cross-motions for summary judgment; Godec sought judgment as a matter of law on the claims, while the defendants sought dismissal. The circuit court found in favor of the defendants and dismissed the case.

¶5 We independently review a grant of summary judgment, utilizing the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). Although our review is de novo, “we benefit from the analysis of the circuit court.” *Atkins v. Swimwest Family Fitness Ctr.*, 2005 WI 4, ¶11, 277 Wis. 2d 303, 691 N.W.2d 334. “A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law.” *Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503; *see also* WIS. STAT. § 802.08(2) (2015-16).¹ “Where, as here, the parties have filed cross-

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

motions for summary judgment, it is generally the equivalent of a stipulation of facts permitting the trial court to determine the case on the legal issues presented.” *BMO Harris Bank, N.A. v. European Motor Works*, 2016 WI App 91, ¶15, 372 Wis. 2d 656, 889 N.W.2d 165. Godec makes four claims, which we address below.

Breach of Governance

¶6 Godec first argues that a notice sent to members in 2012 regarding a vote to elect a new director was defective and therefore the Board was not properly populated. As a result, the vote in 2015 to assess him \$75 was improper. We affirm the dismissal of this claim as the vote to assess \$75 was at an annual meeting in 2015 in which it was the members who voted to change the assessment structure, not any unilateral act of the Board members acting in a representative capacity. The “damage” Godec incurred via members voting for the assessment change has no relation to any perceived defect that may have occurred in 2012. We will briefly, however, address the merits of Godec’s claims.

¶7 Godec argues that the Association bylaws provide the method for proper notice of a meeting and of a proposed amendment to its members, including that “a statement of the nature of such proposed amendment [be] included in the notice of meeting” and that notice may be given to the member “personally, or by sending a copy of the notice through the mail.” Godec objects to the notice as it “did not provide ‘a statement of the nature of the proposed amendment,’” instead directing members to the Hidden Lakes website to review the amendment. Godec admits, however, that the 2012 notice “stated as an agenda item ‘Proposed Changes To The H.L. By-Laws’” and “Voting of Open Board Positions.” We conclude that the language of the 2012 notice was sufficient to

satisfy the requirement to include a statement as to the “nature” of the proposed amendment, and the 2012 action to elect a new director was properly noticed. The Association was not required by the bylaws to include a copy of the exact language of the proposed amendment, and it was not a violation of the governing documents to utilize the internet to provide additional information.

¶8 Godec also argues that the 2015 amendment to the bylaws breached the Association’s governance documents as the 2015 amendment adopting an assessment for lake maintenance “substantially changed the purpose of the corporation.” The Association is required both by its own bylaws as well as state statute to have an “annual meeting” in which all members are entitled to vote on properly noticed issues. Pertinent to this lawsuit, the Articles of Incorporation for the Association indicate that the purpose of the Association is “to own, manage, and maintain, as well as improve, for private use, certain lands” in the subdivision and that “[s]uch Ownership, management, maintenance, and improvement of the community lands shall be for the use and enjoyment of the members of the corporation, their family and guests.” The bylaws, established in 1970, explained that “[c]ommon property shall hereinafter mean and refer to parks, playgrounds, *lakes*, swimming pools, golf courses” and that the Association was created “[t]o provide for the maintenance and beautification of the two lakes included in the properties.”² (Emphasis added.) Clearly, the governing documents of the Association have, since inception, considered the lakes for community use and have established that it is the Association’s responsibility to maintain the lakes. Additionally, the Association has always maintained the lakes and a portion of the

² Godec does not challenge the 1970 bylaws or the 1996 amendment to the bylaws, which did not change the definition of “common property.”

annual dues have always been used for that purpose. Godec has failed to establish a breach of the governing documents.

¶9 Godec also challenges the creation of a debt obligation upon passage of the 2015 amendment. The Articles of Incorporation provide that “[t]he Board of Directors shall have the right to assess all members ... for the maintenance, management, or other improvement of the community lands owned by the corporation” and that “[a]ny assessment or charge, when not paid, shall become a lien on the property owned by the member in default.” We conclude there was no breach.

Breach of Fiduciary Duty

¶10 Godec claims the defendants breached their fiduciary duties as Board members by improperly amending the Articles of Incorporation to assess for lake maintenance and for creating an obligation requiring members such as Godec to pay the assessment. Godec argues, for example, that the Board usurped corporate authority, engaged in self-dealing, acted in contravention of governing documents, and advocated for the amendment. WISCONSIN STAT. § 181.0855 provides that “a director or officer is not liable to the corporation, its members or creditors ... for damages, settlements, fees, fines, penalties or other monetary liabilities arising from a breach of, or failure to perform, any duty resulting solely from his or her status as a director or officer, unless” the complainant demonstrates, for example, “[a] willful failure to deal fairly with the corporation or its members in connection with a matter in which the director or officer has a material conflict of interest” or “[w]illful misconduct.” Godec makes conclusory allegations but fails to set forth evidence establishing the elements of a breach of a fiduciary duty or that such an alleged breach by the Board was in fact willful. We

affirm the dismissal of this claim as although the Board advocated for the change, it was the members, not the Board or any individual member of it, that changed the Articles of Incorporation and who authorized the change in the assessment structure. The circuit court properly noted that Godec's belief that the assessment is "unfair" does not make a claim for breach of fiduciary duty.

Conversion

¶11 Godec relies upon his above claims to say that by assessing him \$75 annually, the Association and the individual board members "wrongfully converted" money from him. "The elements of conversion are: (1) intentional control or taking of property belonging to another, (2) without the owner's consent, (3) resulting in serious interference with the rights of the owner to possess the property." *H. A. Friend & Co. v. Professional Stationery, Inc.*, 2006 WI App 141, ¶11, 294 Wis. 2d 754, 720 N.W.2d 96. We dismiss this claim for the reasons addressed above. We also agree with the circuit court that Godec consented to assessment by the Association when he bought a home within the subdivision.

Injunctive Relief

¶12 Godec seeks to enjoin the Association and the individual Board members from doing anything until the Association is properly constituted, and specifically to enjoin the Association from seeking to collect "improper assessments" from Godec for lake maintenance or placing a lien on his property for his refusal to pay the assessments. Again, neither the Board nor the individual members sued changed the assessment structure—the members themselves did at the annual meeting.

CONCLUSION

¶13 Godec can despair in having to pay \$75 annually to help maintain the two lakes within Hidden Lakes, but he has no legal claim to avoid the assessment. Godec fails to understand or appreciate that what he complains of is solely attributable to the actions of the majority decision of the lot owners (members) within Hidden Lakes. Democracy is no truer than a vote open to all who are affected.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

